NO. 281141-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Plaintiff/Respondent/Cross-Appellant,

v.

JAMES J. ACQUAVELLA; AHTANUM IRRIGATION DISTRICT; JOHN COX DITCH COMPANY; UNITED STATES; YAKAMA NATION; and LA SALLE HIGH SCHOOL; DONALD BRULE & SYLVIA BRULE; JEROME DURNIL; and ALBERT LANTRIP,

Defendants/Appellants/Cross-Respondents.

BRIEF OF APPELLANT AHTANUM IRRIGATION DISTRICT

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I. Introduction

Although *Sate v. Acquavella* has been to Division III in the past, in the Timberlands appeal, the Ahtanum Subbasin is both factually and legally unique in all of the subbasins. A review of the factual and legal history of the Ahtanum Basin would be not only helpful, but also necessary to an understanding of some of the terms and concepts that have become second nature to those who have been involved in Subbasin 23 for decades. A good starting point is *REPORT OF THE COURT CONCERNING THE WATER RIGHTS FOR SUBBASIN NO. 23 (AHTANUM CREEK) AHTANUM IRRIGATION DISTRICT JOHNCOX DITCH COMPANY UNITED STATES/YAKAMA NATION* VOLUME 48 - PART 1, Sections I and III. That history is included in the appendix to this brief.

II. Assignments of Error

No. 1. The Trial Court erred in eliminating the concept of junior water rights, i.e. rights to irrigate land recognized in the Achepohl Decree, unless there was a right granted in the Pope Decree.

No. 2. The Trial Court erred in limiting the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, to lands for which rights were recognized in the Pope Decree.

No. 3. The Trial Court erred in excluding the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, to the time period after July 10.

No. 4. The Trial Court erred in failing to grant a water right to the lands described in Pope Answer No. 179/215 (Hull Ranches) because the son of the 1908 owner, who lived on and farmed the land that was subject to the Code Agreement, rather than the owner of the land signed the Code Agreement.

No. 5. The Trial Court erred by inadvertently failing to confirm a water right to the land described in parcel 171218-23001 of Pope Answer No. 46, after acknowledging that the parcel existed, had been irrigated, and is

owned by one of the three landowners that were to divide the confirmed 60 acre water right allotted to the lands described in Answer 46.

No. 6. The Trial Court erred by inadvertently failing to confirm a water right to the lands described in Pope Answer No. 217.

Issues Pertaining to Assignments of Error

No. 1. Can a junior water right, i.e. rights to irrigate land recognized in *State v. Achepohl*, Yakima County Cause No. 18279 (1925) (hereinafter the "Achepohl Decree") be awarded to a water user on the north side of Ahtanum Creek who was not granted a right granted in the Pope Decree?

No. 2 Under the Pope Decree (*United States v. Ahtanum Irr. Dist*., 330 F.2d 897 (9th Cir. 1964), Ahtanum II, cert. denied 381 U.S. 924 (1965) can "excess waters", i.e. water in excess of all water awarded and beneficially used under the Pope Decree, be used, when available, on lands having an Achepohl Certificate, but were not recognized in the Pope Decree?

No. 3. Under the Pope Decree (*United States v. Ahtanum Irr. Dist*., 330 F.2d (9th Cir. 1964), Ahtanum II, cert. denied 381 U.S. 924 (1965) can "excess waters", i.e. water in excess of all water awarded and beneficially

used under the Pope Decree, be used, when available, on lands having an Achepohl Certificate, after July10?

No. 4. Does the doctrine of res judicata prohibit the Trial Court from awarding a water right to lands described in Pope Answer No. 179/215 (Hull Ranches) after the 9th Circuit ruled, without a full hearing, that the son of the 1908 owner, who lived on and farmed the land, had signed the 1908 Code Agreement, rather than the owner, his out of state mother?

No. 5. Does the Appellate Court have authority to order the correction of an inadvertent error of the Trial Court in failing to confirm a water right to the land described in parcel 171218-23001 of Pope Answer No. 46, after acknowledging that the parcel existed, had been irrigated, and is owned by one of the three landowners that the Trial Court found were to divide a confirmed water right allotted to the lands described in Answer 46, to which no exception was taken?

No. 6. Does the Appellate Court have authority to order the correction of an inadvertent error of the Trial Court in failing to confirm a water right to the land described in Pope Answer No. 217?

III. Statement of the Case

This appeal involves Subbasin No. 23, (Ahtanum), the last of the subbasins to be adjudicated in *State of Washington v. Acquavella,* a general adjudication of the water rights of the Yakima River basin and its tributaries, initiated pursuant to RCW 90.03.110. The proceeding has exceeded three decades in duration and involves thousands of parties divided into subbasins and major claimants. Ahtanum Irrigation District is within Subbasin 23.

After an evidentiary hearing before Judge Walter Stauffacher from April 18 to 20, 1994, the first *REPORT OF THE COURT CONCERNING THE WATER RIGHTS FOR SUBBASIN NO. 23 (AHTANUM CREEK) AHTANUM IRRIGATION DISTRICT JOHNCOX DITCH COMPANY UNITED STATES/YAKAMA NATION VOLUME 48*[1] was filed January 31, 2002. This initial report will be referred to herein as "Report of the Court".

Exceptions and were filed resulting in a bifurcation of legal issues. A *MEMORANDUM OPINl0N RE: AHTANUM CREEK THRESHOLD LEGAL ISSUES*[2] was filed on October 8, 2003. Additional evidentiary hearings were held from January 26 to February 27, 2004, with yet additional hearings through October of 2004. A *SUPPLEMENTAL REPORT OF THE*

[1] CP 974-1459
[2] CP 942-970

COURT CONCERNING THE WATER RIGHTS FOR SUBBASIN NO. 23 (AHTANUM CREEK) AHTANUM IRRIGATION DISTRICT JOHN COX DITCH COMPANY UNITED STATES/YAKAMA NATION VOLUME 48A[3] was entered on February 25, 2008. This document will be referred to herein as "Supplemental Report".

After additional exceptions and the entry of an *ORDER RULING ON CERTAIN EXCEPTIONS TO THE SUPPLEMENTAL REPORT OF THE COURT/PROPOSED CONDITIONAL FINAL ORDER SUBBASIN NO. 23 (AHTANUM)*[4], dated October 14, 2008, the Trial Court entered *MEMORANDUM OPINION EXCEPTIONS TO THE SUPPLEMENTAL REPORT OF THE COURT AND PROPOSED CONDITIONAL FINAL ORDER SUBBASIN NO.23 (AHTANUM), AHTANUM IRRIGATION DISTRICT JOHNCOX DITCH COMPANY, STATES/YAKAMA NATION*[5] on April 15, 2009, which was certified for appeal pursuant to Civil Rule 54(b) and RAP 2.2(d). This document will be referred to herein as "Memorandum Opinion/CFO".

Ahtanum Irrigation District, hereinafter (AID), presented evidence and legal argument on behalf of its members in two evidentiary hearings and numerous legal issues hearings. As relevant to this appeal, the issues

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[3] CP 539-931
[4] CP 532-538
[5] CP 456-531

can be grouped into two main categories, those legal issues dealing with the interpretation of the Pope Decree regarding the right to use of "excess water" and the existence of "junior rights" and those individual claims identified by Pope Answer Number as Pope Answer 179/215 – Hull Ranches, Pope Answer 46 – The Chancery[6], Pope Answer 217 – Splawn, Lynde and Richardson.

Junior Rights/Excess Water

This section contains three separate issues, as stated in Assignments of error 1, 2 and 3. They are:

1. Junior water rights, i.e. rights to irrigate land recognized in the Achepohl Decree, without a right granted in the Pope Decree.

2. The right to the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, to lands for which rights were recognized in the Pope Decree.

3. The right to the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, after July 11.

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[6] The true legal owner of the land in Answer 46 is The Catholic Bishop of Yakima. Answer 46 owner has been designated as "The Chancery" throughout theses proceedings, and will be here as well.

Issues 1 and 2 will be discussed together. In the Report of the Court, dated January 31, 2002, Commissioner Sidney Ottem, after reciting the factual and legal history of Ahtanum Creek[7], began an analysis of the "Northside Off-Reservation Water Rights" at page 105 of the Report. Commissioner Ottem established a three part test for entitlement to a "senior" water right as follows:

> . . . entitlements to use water from Ahtanum Creek on the northside of the creek can only be established if the following requirements are met. First, a claimant's predecessor had to be a signatory to the 1908 Code Agreement. *Ahtanum II*, 330 F.2d 900 ("it was plain that the only water rights which the court would be required to measure and ascertain would be the water rights of the specific individuals who entered into the 1908 agreement"). Second, the claimant's predecessor must have participated in the 1925 Achepohl proceeding and provide evidence of compliance with state law, namely an adjudicated water right certificate. Third, the claimant, or his predecessor, must have filed an answer in *U.S. v. AID, Civil Cause No. 312*, and had that claim affirmed by the Ninth Circuit in Ahtanum II.

CP Report of the Court @ 1086

The Report then addressed whether any right could be established without a claim being affirmed by the Ninth Circuit in *Ahtanum II,* but had received water right certificates from the state as a part of the *Achepohl Adjudication*[8]. As to those parties, the Report created "junior" rights, holding:

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[7] See Appendix A

[8] *State v. Achepohl*, Yakima County Superior Court Cause No. 18279, May 7, 1925

> Thus, although the Court can quantify rights to off-reservation water users who did not file answers, those rights are subordinate to the rights of the reservation water users as they existed in 1915 and subordinate to the rights of those northside users who had rights confirmed in the Pope Decree. But when the available flow exceeds 62.59 cfs, and the on-reservation users are not using that excess nor is it being used to maintain fish life in Ahtanum Creek, then other water right holders off the reservation may divert the excess. flows.
>
> . . .
>
> The Court will base its award to surplus water claimants on an analysis of rights established by the 1925 Achepohl Decree and continued beneficial use.
>
> Further, the Court will also award junior or excess water rights to those AID patrons who were awarded rights under the Pope Decree but have been using more water then that decree authorized.

CP Report of the Court @ 1090, 1091

The Court issued its Supplemental Report on February 25, 2008, making the following significant changes in the concept of junior water rights.

> When excess water is available, north side users are barred by res judicata from asserting rights to any such water except to those lands which were confirmed rights in the Pope Decree.

CP Supplemental Report @ 747

> Therefore, the Court finds that north side users are now estopped from claiming any right to "excess" flows, except for use on specific lands included in or deriving from an Answer number recognized in the Pope Decree. "Excess water" is that water in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation's minimum instream flow right for fish.

CP Supplemental Report @ 750

The Court's Memorandum Opinion/Proposed CFO, entered April 15, 2009, continued to reject the concept of junior rights[9] and modified the "excess water" holding somewhat, as follows:

> The Court agrees with AID's position that the Ninth Circuit would not have addressed the right to use excess water if there was no excess water. Any excess water not used by the Nation is available for use on the north side of the creek. However, the Court does not agree with AID's position that this excess water can be used for additional lands beyond those recognized in the Pope Decree. The Court finds that any excess water can only be used by the defendants, i.e. those recognized in the decree as having rights, on the lands described in Appendix B to the Pope Decree - further limited to the lands for which rights are confirmed in this proceeding. The Pope Decree awarded 0.01 cfs for each irrigated acre, half of the quantity of water authorized for use in the certificates that issued following the earlier adjudication, the *Achepohl Decree*. The Court finds that excess water can be used, when available, on lands north of Ahtanum Creek that are confirmed rights in this proceeding, up to the 0.02 cfs per acre authorized in the appurtenant certificates. The reality may be that in most years there will be no water in excess of that needed to satisfy the north side users and the Nation's water rights. It may also be that when there is excess water available, it may be during the time of the year when the north side users cannot make beneficial use of the water - i.e. early spring. However, that does not prevent the Court from concluding that excess water can be used by north side right holders when the flow exceeds the need and beneficial uses of the Nation.

Memorandum Opinion/Proposed CFO – CP 458-459

As stated in Assignments of Error, 1, 2 And 3, AID maintains that the foregoing decisions of the Trial Court are contrary to established law in the following particulars.

[9] Memorandum Opinion/Proposed CFO – CP 457

1. The Trial Court erred in eliminating the concept of junior water rights, i.e. rights to irrigate land recognized in the Achepohl Decree, unless there was a right granted in the Pope Decree.

2. The Trial Court erred in limiting the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, to lands for which rights were recognized in the Pope Decree.

3. The Trial Court erred in excluding the use of excess waters, i.e. water in excess of all water awarded and beneficially used under the Pope Decree, when available, to the time period after July 11

Individual Claims

Hull Ranches – Pope Answer 179-215

A water right was denied for the land in this claim, land that has, by the undisputed evidence, been continuously irrigated since 1864. All three Trial Court decisions, the *Report of the Court*[10], the *Supplemental Report*[11] and *Memorandum Opinion/Proposed CFO*[12], held that no right could be granted for these claims because, pursuant to the Pope Decree

[10] CP @ 1236
[11] CP @ 882, 890
[12] CP @ 492-493

Ex. A[13], the non-resident owner of the property in 1908 had not signed the 1908 Code Agreement.[14] It had been signed by the son of the owner, who had lived on and farmed the land.

In the April 2009 *Memorandum Opinion/CFO*, the Trial Court addresses AID's exception in the following manner.

> AID asks this Court to correct an obvious and substantial error and find that the application of collateral estoppel here would create an injustice.
>
> . . .
>
> AID argues that application of the doctrine must not work an injustice. It claims it would be an injustice for this Court to apply the doctrine and conclude that it is bound by the rulings in the Pope Decree regarding the lands in Answers Nos. 179 and 215.

The Court denied the exception on the same basis as it had in the *Supplemental Report*, that it was bound by the decision in the Federal Court and could not consider new evidence. AID maintains that res judicata need not be applied where there is an obvious and substantial injustice and the party did not have an opportunity to have a fair hearing on the issue.

In *US v. AID*, the Findings and Conclusions of the Special Master[15] and the Findings and Conclusions of the Trial Court made an award on Answers 179 and 215 consistent with the evidence presented by the Woodhouse family during the trial. It was only on the second appeal that Judge Pope made the change which resulted in removal of the acres from

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[13] *United States v. Ahtanum Irr. Dist.,* 330 F.2d 897 (9th Cir. 1964)
[14] See Appendix, Factual and Legal History, pg 37
[15] CP 2283, 2288

Ex. B to the Pope Decree, without a request from any party and without any opportunity for hearing on the matter.

AID maintains that the failure to allow an opportunity to be heard should result in a ruling that res judicata does not apply. It was four years after the the Trial Court had allowed the claim that the parties learned it had been rejected sua sponte on appeal.

The Chancery – Pope Answer 46

The *Report of the Court* at page 182[16] showed lands encompassed by Answer No. 46 were entitled to a senior water right for the irrigation of a maximum of 60 acres, divided pursuant to Exhibit AID 8-A.[17] The Court found that Certificate No. 328, issued to Andrew Hague, applies to the lands encompassed in Answer No. 46 and authorizes the irrigation of a maximum of 141.50 acres.[18]

The *Supplemental Report*, at page 106[19], found that no objection was made to the amount of the award in the *Report of the Court* and that Ex. AID-8-A divided the 60 acres allowed from the Pope Decree between the landowners as follows: Within Parcel 171218-21004, the Chancery has a right for 23.54 acres and within Parcel 171218-23001, it has a right

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16 CP 1161
17 CP 1529 Ex. AID 8-A (An Index was not prepared for the AID individual exhibits.)
18 CP 1163
19 CP 727

to 20.07 acres; within Parcel 171218-21402, Dwinell's Central Neon has a right to 2.39 acres; and within Parcel 171218-24004, the Wilkinsons have a right to 14 acres. (CP 727)

At page 107 of the *Supplemental Report* the Court identified photographs from which he was better able to determine irrigated acres, finding that the aerial photo reflects 31 irrigated acres in parcel 171218-23001.

Beginning on page 107 and continuing through 108, the Court acknowledged a senior right for irrigation of 60 acres within Answer No. 46 and stated

> " although the senior right described on page 473[20] will not change, the Court will divide it between the landowners… Because the testimony of the number of acres being irrigated was not clear and the Court has aerial photos with what appears to be better information, the aerial photos will be used."

The Court then confirmed rights to the Chancery for parcel 171218-21004, to the Wilkinsons for parcel 171218-24004, and land owned by the Dwinell's Central Neon Co., for lack of additional evidence of beneficial use.

After having acknowledged that parcel 171218-23001 exists, had been granted a water right in the Report of the Court, to which no objection was taken, has been irrigated, and is owned by one of the three

[20] Page 473 is a portion of the *Report of the Court Schedule of Rights*.

landowners that are to divide the confirmed 60 acre water right, the Court inexplicably failed to address parcel 171218-23001 in the final section where other rights were granted as described just a page before. It appears that the Court inadvertently left out a water right for parcel 171218-23001. Evidenced by the fact that the Court addressed the Dwinell claim and ultimately determined that it could not confirm a water right without additional evidence, it is unlikely that the Court would have intentionally denied a right for parcel 23001 without further discussion and citing a reason for the denial.

Because there were no objections made and the mistake was not noticed before the Reconsideration Hearings, the Conditional Final Order only confirmed rights to the Chancery for 23.54 acres, and the Wilkinsons for 14 acres., totaling 37.54 acres of the 60 acres allowed irrigation under the senior right with a priority date of 1888. The Dwinell Neon Company abandoned their claim for a water right to irrigate 2.39 acres. Therefore, because there was a confirmed senior water right in the *Report of the Court*, to which there was no objection, that allows a water right for 60 acres within Answer No. 46 to be irrigated and only 37.54 of those acres have a been granted a water right, the issue should be remanded to the Trial Court to allocate the remaining acres to parcel 23001 and confirm a right to irrigate 22.46 acres.

Richardson Splawn & Lynde – Pope Answer 217

The *Report of the Court*, at page 267[21], found that the claimants in Answer No. 217 were entitled to a provisional right for the irrigation of 65 acres upon the condition that the proper Achepohl Certificate is produced by the date for filing exceptions. AID exceptions, filed at the appropriate time, contained Ex. AID 78, "Evidence in Support of Pope 217"[22]. That evidence and the testimony of George Marshall at the February 10, 2004 Evidentiary Hearing, at page 68-72[23], provided the Trial Court the required evidence to convert the provisional right to a full water right.

In the *Supplemental Report* beginning at page 173, the Trial Court again addressed the question of the proper certificate for Answer NO. 217. Although Mr. Marshall's testimony and the Ex. AID 78 documents provided sufficient evidence to identify the correct certificate, the Court found an inconsistency between that evidence and Ex. AID 8-A, the compilation of all AID Pope Answer claims. As a result, the Court requested clarification of the inconsistency between EX. AID 8-A and Ex. AID 78. Because of the nearly 500 parcels in over 300 pages of rights in the Conditional Final Order, the lack of a right for Answer No. 217 was

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[21] CP 1246
[22] CP 1529 Ex. AID 78
[23] RP 2428-2432 (2-10-2004)

not determined until after the time for providing clarification had expired. AID believed that the problem had been resolved with the submission of Ex. AID 78 and the testimony of George Marshall. The issues was not included in the AID Motion for Reconsideration.

IV. Summary of Argument

Junior Rights/Excess Water

AID maintains that the water rights established in the *Achepohl Decree*, *supra* @ fn 8, survive *U.S. v. AID*, *supra* @ fn 13, and may be satisfied out of the excess water identified in the Pope Decree, in the priority established in the Achepohl Certificates.

The concept of "excess water" is clearly stated in sections I a. and b. and section II of the Pope Decree[24], and serves as the basis for junior rights established in the Achepohl Decree.

Section II of the Pope Decree conditions the grant of all the water of Ahtanum Creek to Reservation lands after July 10 of each year, upon the requirement of beneficial use. Unless and until lands on the reservation are developed to the extent to beneficially use the water awarded in the CFO, it is available to the North side pursuant to the express language in Ahtanum I & II.

[24] *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897, 915 (9th Cir. 1964)

V. Argument

Assignments of Error 1, 2 and 3.

Assignments of Error 1, 2 and 3 all involve the interpretation of the language at page 915 of *United States v. Ahtanum Irri District*, 330 F.2d 897 (1964) (Ahtanum II), known as the Pope Decree. A copy of the decree can be found in the Appendix to this brief at section

Junior Rights/Excess Water

In the *Supplemental Report* and *Memorandum Opinion/Proposed CFO,* the Trial Court rejected the claim of the AID that excess water could be used on lands with only an *Achepohl* right and after July 10. AID asks this Curt to adopt the position taken by the Trial Court in the initial *Report of the Court* from page 106 – 114[25] where the Court allowed for the use of excess water by Claimants who had not been awarded a senior right as well as those who had.

In its *Supplemental Report*, the Trial Court misinterpreted both *Ahtanum I* and *Ahtanum II*[26]. The Court also disregarded specific language in *Ahtanum II* (the Pope Decree) in reaching its conclusion that

[25] CP 1085-1094

[26] *US v. AID,* 236 F.2d 321 (9th 1956**),** 330 F.2nd 897 (9th Cir. 1964)

there is no right to excess water except, under certain circumstances, for Claimants awarded a senior right.

The factual underpinning of the Court's decision regarding a junior/excess water right is found on page 27 of the *Supplemental Report* beginning at line 17[27] where the Court states:

> "Clearly, that Court believes there is no real surplus or excess water to distribute . . . "

The Court then cited section I a. of the Pope Decree, which made the award to the North side Defendants. Included in that section is the following language:

> And provided that when the said measured flow exceeds 62.59 cubic feet per second, *defendant shall have no right to the excess, except in subordination to the higher rights of the plaintiff.* (Emphasis added)

The Decree further provides at section (b), the award to the plaintiffs,

> All of the excess over that figure is awarded to Plaintiff, *to the extent that said water can be put to beneficial use.* (Emphasis added)

The Trial Court concluded that *U.S. v. AID (Ahtanum II)* allocated all of the natural flow available for irrigation to the north and south side. That is a correct statement of the decision, but what the Court neglected to consider is that by specific reference to excess water, *Ahtanum II* included

[27] CP 748

excess water within the amount allocated, subject to the beneficial use requirements.

The language in the Pope Decree awards specific amounts of natural flow to the north and south sides with the requirement that the excess must be beneficially used on the south side if it's use is to be deprived to the north side.

When Judge Walter Stauffacher addressed the Practicably Irrigable Acreage issue in 1994, he cited language from Ahtanum II regarding the maximum number of acres susceptible of irrigation on the South side of Ahtanum Creek.

> Judge Pope then addressed the issue of the number of acres susceptible to irrigation. He states:
>
> > "the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."
> >
> > . . . .
> >
> > "by 1915 the Indian lands upon the reservation susceptible of irrigation from Ahtanum Creek amounted to approximately 5000 acres. Had there been no 1908 agreement, it seems plain that as of 1915 it would have to be said that the rights reserved in the treaty were rights to the use of water from this stream sufficient to supply the needs of this 5000 acres."
>
> *Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage*, November 19, 1994 citing *Ahtanum II* @ 899

The Trial Court's reference to various portions of *Ahtanum II*, which state that the Ahtanum Indian Irrigation Project would take substantially all of the waters of Ahtanum Creek, is factually correct but practically irrelevant. It may be true that there is sufficient irrigable land on the south side to take all of the available water of Ahtanum Creek, and that might be the case if it were not for the 1908 Code Agreement[28], but the fact remains that the potential of the Ahtanum Indian Irrigation Project has never been fully developed and is not at the present time fully developed. Somewhat just over one-half of the PIA has ever been under irrigation.[29]

The Trial Court's Memorandum Opinion/Proposed CFO at page 56 and 60[30], concluded, as to the YN irrigable acres

> When the United States made its initial Acquavella claim on behalf of the Yakama Nation, it claimed that 2,787.7 acres were irrigated and an additional 577.8 acres had been historically irrigated, but were idle.
>
> . . .
>
> The 1957 Order, Agreed Fact XVI and the 1951 Order include the non-Indian fee lands (Class III defendants) in the agreed to total of 5,100 acres. Of this amount, there are currently 992.39 acres of fee land owned by individuals on the south side that are derivative of the 1855 Treaty. The Court having confirmed a separate right for those lands, the Yakama Nation is entitled to an irrigation right of 4,107.61 acres.

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[28] Appendix A @ pg 37

[29] Memorandum Opinion Ahtanum PIA, CP 1500

[30] CP 511, 515

In 2004, AID and Johncox Ditch Co. presented evidence of the number of acres actually irrigated on the South side. The Declarations of Agricultural Engineer Richard Haapala and George Marshall concluded that the number of actual irrigated acres was just over 2000.[31]

The Yakama Nation argument that there can be no excess water is based on the fact that the quantity necessary to irrigate its total irrigable acres would consume all of the water, leaving no excess. But, as can be seen, the difference between irrigable and irrigated acres is large. Even in low water months, there are time when excess water exists, as stated in the Declaration of Andreas Kammereck.[32]

In the *Supplemental Report* and *Memorandum Opinion/Proposed Order*, the Trial Court's decision regarding junior/excess water is premised on the finding that there is not any natural flow available for other irrigation uses. The Court's decision is based on the assumption that as constructed the Wapato Project could use all of the available water. The operable word is "could", not "has". There is no arguing that if sufficient land is developed on the south side which, by the use of recognized water duties, was in fact irrigated, there may be no excess water. But, unless or until that circumstance occurs, there are occasions

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[31] DECLARATION OF RICHARD V. HAAPALA IN SUPPORT OF JOHNCOC DITCH COMPANY'S INITIAL POST-EXCEPTION HEARING BRIEF – CP 11-50 and Declaration of George Marshall dated July 27, 2004 – CP 2356-2360

[32] CP 3-10

when the flow in the Ahtanum Creek and its tributaries is sufficient to produce excess water over and above all other Pope Decree uses. See Kammereck Declaration @ fn 29.

Whether there is or is not excess water should not be dependent upon the quantity of irrigable land on the south side, but on the day-to-day needs on the south side for beneficial use. Irrigable acres are relevant to the paper water right of the Yakama Nation. Irrigated acres are relevant to the existence of excess water.

Exhibit B to the Pope Decree is list of those parties who are entitled to a portion of the 46.96 cfs award.[33] The Pope Decree recognized the right to use amounts in excess of 46.96 cfs and placed no limitation on where such use was to be made. Therefore, the use of excess water must be governed by state law under the provisions of the *Achepohl Decree*.

The Court, in its discussion regarding the definition of the word "defendants", overlooks language in the preamble to the Pope Decree and the basic legal argument that there is a state based right authorized in *Ahtanum I,* 236 F.2d 321 (9th 1956**),** which survives the decree in *Ahtanum II*. In the *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th 1956), the following was stated:

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[33] fn 23

> More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers. The rights of the white settlers to the use of the water was subordinate to the rights of the Indians, but they were not non-existent. *Until the Indians were able to make use of the waters there was no legal obstacle to the use of those waters by white settlers.* And after the Indian irrigation works were completed, there would still be a right of the non-Indian appropriators to make use of any surplus available within the stream. *Ahtanum I* at 335. . .
> (Emphasis Added)
>
> . . .
>
> As we have said, the implied reservation of waters of this stream extended to so much thereof as was required to provide for the *reasonable needs* of the Indians, not merely as those needs existed in 1908 but as they would be measured in 1915 when the Indian ditch system had been completed. *Ahtanum II* at 337. . .
>
> To the extent that the defendants are to be permitted to have any part of the use of that portion of the flow of the stream, their rights are deraigned from the agreement of 1908. Apart from that agreement, those defendants would have no right to the use of any of said waters except in strict subordination to the prior and better rights of the United States as trustee for the Indians. Of course, *as between themselves, they could acquire priorities under state law in respect to their use of the surplus after the interests of the Indians had been satisfied* but in relation to that surplus only. *Ahtanum I* at 340. (Emphasis Added)

That language clearly leaves the allocation of the excess to be determined by state law, according to the priorities established in the *Achepohl Decree* and to the parties having Achepohl Certificates. The next question is whether that language from *Ahtanum I* survives the treatment given to the issues by Judge Pope in *Ahtanum II*. That court stated as follows regarding those issues.

> This court held that by reason of the rules laid down in *Winters v. United States*, 207 US 564, 28 S.Ct. 207, 52 L.Ed. 340, and other decisions of this court applying the rule of the *Winters* case, including *Conrad, Inv. Seal. v United States*, 9 Cir., 161 F. 829 and *United States v. Walker River Co*., 9 Cir., 104 F.2d 334, all the waters of Ahtanum Creek or those so much thereof as could be *beneficially used* (emphasis added) on the Indian reservation were, by virtue of the treaty reserved for use by the Indian tribe upon their lands. *Ahtanum II* at 899.

The court in *Ahtanum II* then cited the above-referenced portion of *Ahtanum I* specifically adopting the language in *Ahtanum I,* which granted the right of white settlers the use of waters *subordinate to the rights of the Indians to the extent of beneficial use by the Indians*. The Ahtanum II court stated:

> Obviously those rights, so far as the Indians were concerned, arose from the provisions of the treaty, insofar as the rights of defendants were concerned, arose under the laws of the State of Washington. *Ahtanum II* at 900

The court in *Ahtanum II* went on to fashion its decree with specific reference to the above-quoted language from *Ahtanum I* as adopted in *Ahtanum II*. The decree at I a., by use of the phrase "*except in subordination to the higher rights of the plaintiff*", makes a direct reference to the above-quoted language from *Ahtanum I*.

Therefore, the right to excess water which forms the basis of junior rights is well grounded in both *Ahtanum I* and *Ahtanum II*, both of which defer to state water law for regulation of the rights which have now come

to be defined as junior rights. Those rights are reflected in the various state certificates arising out of the *Achepohl Decree*.

Reading both Pope Decree sections a and b together, the Decree provides a right to the defendants to excess water to the extent the plaintiff is unable to beneficially use the amount over that awarded in the Pope Decree. The Trial Court analyzed the question of whether North side users had a right to use excess water after July 10 by trying to define the term "defendants" in the decree. In the Supplemental Report, at page 28, the following was stated.

> There are three possible groups who could constitute the class of "defendants" pursuant to the Pope Decree. 1.) Those parties to this case who are not successors to the Code Agreement and were not made "defendants" to the Pope Decree; 2.) Those parties to this case who were defendants in *U. S. v. Ahtanum Irrigation District,* but who had rights denied in that case; and 3.) Those defendants who were recognized in, the Pope Decree as having a right, but who are irrigating more land than was awarded a water right in the Pope Decree or are using more water on the lands having a water right than recognized in, the Pope Decree.
>
> The preamble to the Pope Decree contains the following language.
>
> It is ordered, adjudged and decreed that the waters of Ahtanum Creek shall be and are hereby divided between the *parties to this action* in the following manner and at the following times. *Ahtanum II* at 915 (Emphasis Added)

While the Trial Court focused on the term "defendant", in the individual sections of the decree, AID believes it appropriate to see who Judge Pope intended to divide the waters of Ahtanum Creek between. In

the preamble, that was said to be "the parties to this action". While the "defendants" who participated in the 46.96 cfs awarded to the North side were certainly parties, and defendants, who received a portion of what was divided, the percentage allocation was not the only provision for the North side, and those defendants were not the only North side parties.

Post July 10 Excess Water

The same argument can be made as to section II, the post-July 10 section of the decree as it too places the beneficial use requirement on the water to be used after the 10th of July on the south side.

The Trial Court made the erroneous conclusion that section I b. is the only reference to the use of excess water by the Defendants. The Court disregards section II of the Decree, which allocates all water after the 10th of July to the Plaintiff for use on the reservation, *to the extent that said water can be put to beneficial use*. What is to happen to water that cannot be beneficially used on the reservation after July 10? If it would be wasted, or used in excess of instantaneous rights on land now developed, AID maintains that *Ahtanum I & II* allow use on the North side after July 10, to the extent it is available.

The right to use excess water is much like the right to use return flow. It can be used if it is present but there can be no right to require it to be present.

In 1994, Judge Stauffacher addressed the issue of return flow in the context of the 1905 limiting agreements. In his *Memorandum Opinion Re: Motion for Reconsideration of Limiting Agreements,* filed April 1, 1994, Judge Stauffacher wrote:

> Normally, rights to foreign return flow in Washington are controlled by the cases of *Dodge v. Ellensburg Water Co*., 46 Wn. App. 77 (1986) and *Elgin v. Weatherstone*, 123 Wash. 429, 212 P. 562 (1923).
>
> ...
>
> *Elgin & Dodge* also instruct that no specific state water right can be obtained to such waters, but, once abandoned, they may be available to the first capturer

The documents filed herewith from Golder & Associates, in the Kammereck Declaration[34] reflect that, from time to time, in varying quantities, there is water "in excess of that needed to satisfy all confirmed water rights both on and off the reservation and any water needed to satisfy the Yakama Nation minimum instream flow for fish".

Supplemental Report at 29-30.

Pope Answer 179/215 – Hull Ranches

[34] CP 3-10

During the course of the AID presentation of evidence on Answer Number 179/215, evidence was proposed that an obvious factual error had been made in the Findings and Conclusions made by Judge Pope. In the Findings and Conclusions of the Special Master and the Findings and Conclusions of the Trial Court, the Special Master and the Trial Court made an award on Answers 179 and 215 consistent with the evidence presented by the Woodhouse family during the trial. When the matter was up on appeal, Judge Pope made an erroneous finding that there was no 1908 signor for the Woodhouse claims. There was in fact, such a signor. Norman Woodhouse, signed for his mother, who lived in Utah. Woodhouse is predecessor on the property in question to Hull Ranches.

Evidence was presented from Gail Woodhouse, great grandson of Sophia Woodhouse, regarding the family history on the subject property. Mr. Woodhouse testified by declaration that although the property was technically in the name of his great grandmother, Sophia Woodhouse, the land was farmed by his grandfather Norman Woodhouse. He testified that his great grandmother, Sophia Woodhouse, never resided in the State of Washington. She resided in the State of Utah. During the 1908 Code Agreement settlement, Norman Woodhouse signed the Code Agreement on behalf of the property owned by his mother and as a representative of

the family, being the member of the family who actually resided on the property, farmed it and had intimate knowledge of its characteristics.

On a related issue decided by this court in the Threshold Issues Memorandum, the Yakama Nation cited the case of *Shuman v. State of Washington*, 108 Wn.App 673 (2001) regarding collateral estoppel. The Nation there argued that collateral estoppel does not allow re-litigation of an issue before this court merely because the opposing parties think the result in the Ninth Circuit is incorrect. The Court in *Shuman* at page 677-678 held:

> A party seeking to invoke the doctrine of collateral estoppel must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the section action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

The *Shuman* Court citing *Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999) focused on whether the parties to the earlier proceeding received a full and fair hearing on the issue in question. Before the Special Master and the Trial Court, Woodhouse did receive a full and fair hearing, presenting evidence of all of the elements necessary to establish a valid claim. Based upon that evidence the Special Master and the Trial Court approved the claim. It was only in Judge Pope's correction of the Trial Court Findings of Fact that the error was made

removing the Woodhouse acres from the finding which would become Exhibit "B" to the Pope Decree.

The issue of avoiding injustice in the context of collateral estoppel is discussed in *Washington Practice*, Volume 14A, Civil Procedure, Section 35.36. Regarding collateral estoppel, that authority states . . .

> the party asserting collateral estoppel bears the burden of persuading the court that application of the doctrine will not work an injustice. To look at it from another party's point of view, a party sought to be estopped may be able to avoid the doctrine, even if all the other requirements are satisfied by persuading the court that to apply the doctrine would be unjust on the facts of the case. . . .
>
> The Restatement (2nd) of Judgments offers a laundry list of situations in which the doctrine of collateral estoppel should not be applied for policy reasons. The Restatement (2nd) of Judgment, Section 28 provides as follows:
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . .
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interests or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of subsequent action, or (c) because the parties sought to be precluded as a result of the conduct of his adversary or other special circumstances, *did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.*

Was Norman Woodhouse an Agent of Sophia? The relation of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. (2A C.J.S. §52 pg.623) The law creates the relationship of principal and agent if the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred.

Mere relationship or family ties, unaccompanied by any other facts or circumstances will not justify an inference of agency, but such relationship is entitled to great weight, when considered with other circumstances, as tending to establish the fact of agency. It has been held that where a subsequent donee of real property is a member of the family of the first grantee there is a unity of parties, and an implied or quasi agency relationship exists between the grantee and the donee. *Davis v. Mullis*, 296 F. Supp. 1345, 2A C.J.S. §53 pg.629)

Sophia Woodhouse, the Code Agreement signor, did not live in Washington. Norman lived both in the state and on the land and had intimate knowledge of the land.[35] It is reasonable to infer that Norman had implied agency authority to make decisions regarding the land on behalf

[35] CP 1529 – Ex. AID 31, RP 2546-2600

of his mother. Sophia being the first grantee of the property and Norman being the donee gave rise to an implied or quasi-agency relationship.

Based upon the general rule cited in *Shuman*, *The Restatement* and *Washington Practice* regarding injustice, and the agency authority cited above, Hull Ranches should be found to have established an exception to the res judicata standard and an equitable decision to correct an obvious error should follow.

Pope Answer 46 – The Chancery

As stated in the summary section, the Trial Court appears to have overlooked a single parcel in the award of water rights to the Chancery. The record does not reflect that a studied decision was made to reject the parcel, since it was discussed favorably in the *Supplemental Report* and was not addressed in such a way as to show a reason why it was not included. Therefore, it appears not to be a judicial error, but is a clerical error that can be corrected by an appellate court, if it was not noticed and corrected in the Trial Court. In *Callihan v. Department of Labor and Industries*, 10 Wn.App. 153, 516 P.2d 1073 (1973), the Court held, at page 156, regarding correction of a clerical error in an appellate court.

> Inadvertent clerical errors creep into both administrative and judicial proceedings. The manner of handling clerical errors in judicial proceedings is clear. An appellate court may itself correct a clerical error in a judgment appealed from without remanding the judgment to the trial court for that purpose. A court has inherent

> power to correct a clerical error in order to make the true action of the court conform to the record. This power may be exercised*157 in those jurisdictions in which terms of court are held even after the end of the term. In judicial proceedings, rules exist to insure that substance shall not give way to form, E.g., *CR 60.* Thus, a clerical error can be corrected without reformation. Delay is no defense to the correction of a clerical error, at least in the absence of a showing of prejudice.

Based on this case, the appellate court may order the missing parcel to be included in the Conditional Final Order or remand to the Trial Court to correct the clerical error.

Pope Answer 217 – Richardson, Splawn & Lynde

AID requests remand of the Pope Answer 217 issues to the Trial Court to allow a determination of the claimant's rights, due to the failure of the trial court to include rights after proper documentary evidence was submitted and testimony provided. AID adopts the argument presented in the preceding section on clerical error, citing *Callihan*.

VI. Conclusion

AID requests the following relief.

1. That the Trial Court's decision in the Report of the Court, granting junior water rights and use of excess water, without regard to an award in the Pope Decree, be reinstated.

2. That the Trial Court's decision in Pope Answer 179/215 be overturned and the evidence submitted by Hull Ranches be considered to create an exception to the doctrine of res judicata because their predecessors did not have a full and fair hearing on the precluded issue.

3. That the apparent clerical error in failing to include a parcel in the Chancery claim be corrected as a clerical error or the case be remanded for correction by the Trial Court.

4. That the Pope 217 claim be remanded to the Trial Court for correction of the failure to grant a right after submission of evidence requested by the Trial Court.

Respectfully submitted this _____ day of March, 2010

Digitally signed by Jim Davis
DN: cn=Jim Davis, o, ou, email=jdavis@talbottlaw.com, c=US
Date: 2010.03.15 15:12:00 -07'00'

James E. Davis
Attorney for Appellant, Ahtanum Irrigation District
WSBA # 5089

VII. APPENDIX

A. Historical and Legal Background

B. Pope Decree

YAKIMA RIVER BASIN

WATER RIGHTS ADJUDICATION

The State of Washington, Department of Ecology v.
James J. Acquavella, et al.

Yakima County Superior Court Cause No. 77-2-01484-5

REPORT OF THE COURT
CONCERNING THE WATER RIGHTS FOR THE

SUBBASIN NO. 23
(AHTANUM CREEK)

AHTANUM IRRIGATION DISTRICT

JOHNCOX DITCH COMPANY

UNITED STATES/YAKAMA NATION

VOLUME 48 - PART I

III. LEGAL AND FACTUAL HISTORY OF AHTANUM CREEK

As noted previously, Ahtanum Creek water users are familiar with water right disputes: This is the third proceeding since the 1920's to inventory the rights and priorities in that watershed. As counsel for the Ahtanum Irrigation District (AID) so accurately noted:

> "The Ahtanum area has produced more litigation per gallon of water involved, than any other irrigation district in the State of Washington, maybe the United States." Trial Brief at 5.

The factual and legal history surrounding these controversies will be set forth below.

a. Factual History

The headwaters of Ahtanum Creek arise on the eastern slope of the Cascade Mountains flowing 40 miles east to the confluence with the Yakima River. The South Fork and the North Fork join to form the main channel of Ahtanum Creek. However, after the two forks join, Ahtanum Creek splits into three principal channels and rejoin downstream before Ahtanum Creek empties into the Yakima River. YIN – 34 at 28 (Foxworthy, Geology and Groundwater Resources of the Ahtanum Valley, Yakima County Washington, Geological Survey Water-Supply Paper, 1962.) Those channels are separately named as Bachelor Creek, Stanton Creek and Hatton Creek. In addition, Spring Creek, which has its source in the northeastern section of the Ahtanum valley, also provides irrigation water to various users in that section of the subbasin. Ahtanum Creek then empties into the Yakima River near the town of Union Gap, approximately four miles south of the city of Yakima. Ahtanum Creek also serves as a portion of the northern boundary of the Reservation. There are no existing storage facilities

on Ahtanum Creek. The average annual inflow of the North Fork and South Fork is about 62,000 acre-feet. Id., at 27. May is the month of greatest average runoff, and September is the month of minimum average flow. Id.

AID and Johncox Ditch Company (Johncox) provide service to northside users. AID contains over 10,000 acres and claims a right to irrigate 5,932 acres while Johncox claims 909 acres. AID is somewhat unique as an irrigation provider in that it owns no canals, diversions works or distribution systems. Rather, the creek channel is the conveyance work and the individual right holders divert water from the creek. Consequently, to establish AID's rights requires the Court to determine the rights of the individuals who make up AID. More on this issue later.

The reservation landowners are served by the Wapato Irrigation Project, Ahtanum Unit. Two main canals divert water from Ahtanum Creek for delivery to the water users: Ahtanum Main Canal and the Lower Canal. The Ahtanum Main Canal has its point of diversion in Section 14, T. 12 N., R. 16 E.W.M., not far from where the south and north forks of Ahtanum Creek join. The water users pay assessments to the WIP, which delivers the water prorata to the many fee owners as well as those properties held in trust for the benefit of the Yakama Nation.

b. Legal History

Although the entire Yakima Basin is layered with many adjudication decrees, consent decrees and various contracts, nowhere is this more concentrated then in the Ahtanum watershed. To determine the rights, in addition to an understanding of what the water users are actually doing, one must analyze the following precedents: Treaty with the Yakama Indian Nation of June 9, 1855; Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897); State of Washington v. Annie Wiley Achepohl et al., Yakima County Cause Number 18279; In Re Ahtanum Creek, 139 Wash 84, 245 P. 758 (1926); United States v. Ahtanum Irrigation District, 124 F. Supp. 818 (1954); United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir., 1956)(Ahtanum I); United States v. Ahtanum Irrigation District, 330 F.2d 897 (1964)(Ahtanum II); and this Court's rulings in Acquavella.

1. 1855 Treaty with Yakama Nation

As previously noted, Ahtanum Creek constitutes a part of the northern boundary of the Reservation which was created by the Treaty with the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. That treaty has been previously analyzed and the Court found two primary purposes of the treaty were to reserve water for irrigation on-reservation and also to maintain fish life in the Yakima basin. Memorandum Opinion Re: Motions For Partial Summary Judgment (As Amended), dated October 22,

1990 at p. 44 affirmed Ecology v. Yakima Reservation Irrig. Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993). Two treaty rights have also been found for Yakama Nation's use of Ahtanum Creek. Ahtanum I and Ahtanum II; Memorandum Opinion: Treaty Reserved Water Rights At Usual and Accustomed Fishing Places, dated September 1, 1994. The specific water rights deriving from these treaty rights will be discussed later in this Report.

2. Benton v. Johncox

The next significant water-related event in the Ahtanum watershed transpired in 1897. In Benton v. Johncox, the early riparian water users sought a restraining order against the later, appropriative water users, most of whom were in the Johncox area. The non-riparians argued the riparian doctrine did not apply to the Yakima watershed. The Supreme Court disagreed, holding the common law right of a riparian existed in Washington. Unlike common law riparian rights, which do not require priority dates, a date of priority was enunciated for these riparian rights as being the date the settler first took action to acquire title. Demarcating a priority date was necessary to accommodate both the riparian and prior appropriation methods of securing a water right and protect which ever was earlier in time. That case was crucial to Acquavella as it did affect the priority of rightholders and was essentially an adjudication between riparian and appropriative users.

3. "Code" Agreement

In 1908, the federal government and northside Ahtanum water users entered into an agreement. Pursuant thereto, the north side users agreed to limit their claim to 75% of the streamflow and the U.S., on behalf of the Yakama Nation, agreed to use 25% of the natural flow. These quantities approximated what the users on either side were using in 1908. The agreement limits itself to the "natural flow" of the stream. Return flow was to be divided in the same quantity. The agreement, signed by W.H. Code on behalf of the then Indian bureau, also provides for use of flows for stock watering.

4. State Court Adjudication -- Achepohl

In State of Washington v. Annie Wiley Achepohl et al., Yakima Superior Court Judge V. O. Nichoson, after considering the report of the referee and exceptions thereto, entered a final adjudication decree quantifying the rights of the northside water users to Ahtanum Creek flows. Signatories and non-signatories to the 1908 Code Agreement were divided into 31 separate priority classes based on a "first in time, first in right" analysis. According to AID, that decree is still used to apportion the 75% flow among northside users. Certain claimants in that adjudication, including Johncox, appealed to the Supreme Court but the trial court's findings were upheld. In Re Ahtanum Creek, supra. The results

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from the Achepohl proceeding were ultimately reduced to adjudicated water right certificates issued by Ecology's predecessor. Those certificates form one of the primary legal backbones for determining the water rights of defendants in Acquavella.

5. Federal Court Action

The U.S. on behalf of the Yakama Nation filed a complaint in 1947 to undo the 1908 Code Agreement and assert a right to more of the creek flow than the 25% reserved to Yakama Nation. United States v. Ahtanum Irrigation District, Civil Cause No. 312 (1947). The District Court, finding that neither the U.S. nor YIN had any rights to water from Ahtanum Creek dismissed the complaint on October 29, 1954. The U.S. appealed the dismissal resulting in the Ninth Circuit's decision in Ahtanum I.

The Ahtanum I court was concerned with two questions on appeal. First, based on the ruling by the lower court that the U.S. and the Yakama Nation had no interest in Ahtanum Creek whatsoever, the Ninth Circuit had to determine if the Treaty of 1855 had reserved any rights to the creek. Because that was found to be true, the Ahtanum I court then needed to determine if the right was greater than the 25% of the creek's natural flow set forth in the 1908 Code Agreement.

In addressing the question as to the amount reserved for the Yakama Nation, the Ninth Circuit determined the Code Agreement was enforceable and valid. Judge Pope, writing for the panel, also limited the use of the water in regard to the Yakama Nation to those rights initiated prior to 1915 and the northside users to only those who were signatories to the 1908 Agreement. The court stated that:

> "an agreement of the character of that executed in 1908, must be construed as reserving to the Indians, who previously owned substantially all of the waters, everything not clearly shown to have been granted." Ahtanum I at 341.

The appellate court remanded the case back to the District Court with direction to conduct a parcel-by-parcel investigation as to whether the 1908 lands were continuing to beneficially use the 75% of the water granted in the 1908 Agreement.

The trial to determine beneficial use by the northside users before the Special Master began July 22, 1957, and lasted 135 days. Answers for 221 individuals along with Johncox were filed in response to the complaint of the U.S. After hearing the evidence, the Special Master issued his findings which set forth the specific acres that were irrigated by successors of the 1908 signatories in 1957 as well as the land that was irrigated in 1908. The Special Master did not make an examination to

ensure that use of water on the lands in any way conformed with Washington water law. Ahtanum II at 901. In total, 5,718 acres were decreed a water right.

The U.S. appealed again to the Ninth Circuit and Judge Pope again authored the opinion in Ahtanum II. Judge Pope admonished the Special Master for basing the water right on the needs of the 1908 landowner rather than on the actual use. Id. at 901-904. The court then proceeded to re-evaluate the evidence and reach its own conclusion as to proof of beneficial use by the answering defendants. One conclusion reached by the court was the water rights of the northside diverters, as used in 1908, were limited in period and ceased each year on July 10. After that date, all water reverts to the southside users. The Ninth Circuit also reduced the acreage findings to the lesser of the amount irrigated in 1908 or 1957. This decreased the amount of allowable irrigated lands to 4,696 acres and the northside users were also limited to a maximum 46.96 cubic feet per second (cfs). The southside users received the remainder of the flows and any amount in excess of 62.59 cfs (the amount needed to maintain the 75%-25% split) provided that water could be put to a beneficial use. The court also found no right for stock water. The Court will take this matter up later.

6. Acquavella Rulings

This Court, on two separate occasions, has addressed water right issues in Ahtanum Creek regarding Yakama Nation's treaty fishing and irrigation rights. Memorandum Opinion: Treaty Reserved Water Rights At Usual and Accustomed Fishing Places, September 1, 1994 (fish ruling) and Memorandum Opinion Re: Ahtanum Watershed Practicably Irrigable Acreage, November 9, 1994 (PIA ruling).

A. **Fish ruling**

The major claimant irrigators motioned the Court to limit the Yakama Nation's water right at off-reservation "usual and accustomed" fishing locations, see Treaty of 1855, Article 3, including Ahtanum Creek. (See Consolidated Motion To Clarify 11/29/90 "Amended Partial Summary Judgment," For Declaratory Judgment and In Limine Re: Reserved Treaty Fish Water Rights dated December 22, 1993; see also Amended Supplemental, Consolidated Motion to Clarify 11/29/90 "Amended Partial Summary Judgment," For Declaratory Judgment And In Limine Re: Reserved Treaty Fish Water Rights dated December 23, 1993). The Court considered all the federal actions in developing the Ahtanum reservation location and concluded the treaty fishing right had been diminished, but not completely destroyed. The Court directed the Wapato Irrigation Project manager

to ensure enough water remained in the creek to maintain fish life in light of annual prevailing conditions.

B. **PIA ruling**

In Arizona v. California, 373 U.S. 546 (1963), the Supreme Court clarified the means by which the treaty water rights of Indian tribes would be measured; the practicably irrigable acreage (PIA) standard. When the U.S. put forth its case-in-chief regarding the PIA susceptible to irrigation from Ahtanum Creek flows, a number of southside, non-Indian irrigators objected to the admission of certain evidence submitted by the U.S. on the grounds of relevance. It was the non-Indian's argument that all of the Yakama Nation's reserved rights to flows in Ahtanum Creek had been quantified in Ahtanum I and II. The Court, relying on those cases and the doctrine of res judicata set forth in Nevada v. U.S., 463 U.S. 110 (1983), agreed with the non-Indians but did permit the U.S. to submit its evidence on PIA for the following purpose:

> "to the extent it applies to future projects for irrigation of the irrigable acres as already quantified and claimed in the Ahtanum proceeding."

7. Conclusion

Although not directly argued by the parties, there is some inference by AID that the federal decree established by the Ninth Circuit in Ahtanum II is not binding on the parties. That inference arises from the fact that AID has continued to deliver water pursuant to the 1926 decree. Although it has been implied in other Acquavella rulings, this Court will now make a specific finding regarding the binding effect of the federal court decree.

Federal water right decrees are not unusual. In fact, the two river systems in western Nevada that might be the subject of more litigation than Ahtanum Creek, the Truckee and Carson rivers, were the subject of two federal decrees. U.S. v. Orr Ditch and U.S. v. Alpine Lake. Prior to enactment of the McCarren Amendment in 1952, 43 U.S.C. § 666, no statute waived the sovereign immunity of the United States to allow the adjudication of federal water rights in state court. Thus, in 1947 when the United States began to litigate in federal court rights to Ahtanum Creek, there would have been nothing authorizing the transfer of that litigation to state court. Thus, on that basis alone, this Court could find that federal jurisdiction in U.S. v. Ahtanum was appropriate and the resulting decree binding.

However, the United States Supreme Court examined the issue in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) and made specific rulings dispositive of the issue. One of the questions before the Supreme Court was whether the McCarren Amendment

terminated jurisdiction of federal courts to adjudicate federal water rights. 424 U.S. 806. Under 28 USC § 1345, the federal district courts have original jurisdiction over all civil actions brought by the Federal Government "[e]xcept as otherwise provided by Act of Congress." The Supreme Court determined the McCarren Amendment did not repeal jurisdiction under § 1345, and federal courts have jurisdiction to hear cases involving federal rights to the use of water. 424 U.S. 809. Federal district court and Ninth Circuit decisions in the U.S. v. Ahtanum litigation must be given full force and effect.

This opinion sets forth very little factual or legal background associated with the Ahtanum subbasin. The history ofwater use and litigation for the area is quite extensive. For a more complete picture of that background, the parties should consult the Report, particularly at pages 35-53 and pages 105-119. However, to decide the various threshold issues, the prior legal precedents in the Ahtanum subbasin must be analyzed and interpreted. The Court will briefly recount the prior decisions and actions that generally define the rights of Ahtanum Creek water users.

The Ahtanum Creek subbasin was a portion of the area historically used by the Yakama Nation. In about 1850, non-Indian settlement began to occur in the area and on June 9, 1855, a treaty was signed establishing a permanent reservation for the Yakama Nation. Ahtanum Creek forms part of the north boundary of that reservation. In 1908, Chief Engineer Code of the Bureau of Indian Affairs, executed an agreement between the United States and non-Indian landowners on the north side and outside of the Yakama Nation's reservation. That agreement (hereinafter 1908 Code Agreement or Code Agreement) divided the flow of Ahtanum Creek and assigned 75% to the north side users and 25% to south side or on-reservation users. The stream was the subject of a state adjudication in the mid-1920's culminating in *State of Washington v. Annie Wiley Achepohl et al. (Achepohl).* In 1947, the U. S. on behalf of the Yakama Nation filed a complaint to undo the 1908 Code Agreement and assert a right to a larger portion of the creek flow then the 25% reserved to the south side water users. The case is generally referred to herein as *U.S.* v. *AID.* That process resulted in one District Court published opinion, *United States v. Ahtanum Irrigation District,* Civil Cause No. 312 (also reported at 124 Fed. Supp. 818), and two extensive Ninth Circuit decisions. *United States v. Ahtanum Irrigation District,* 236 F.2d 321 *(Ahtanum* I) and *United States v. Ahtanum Irrigation District,* 330 F.2d 907 *(Ahtanum 11* or the Pope Decree). In addition, AID filed a petition for reconsideration which resulted in a short decision by the Ninth Circuit set forth at 338 F.2d 307.

United States Court of Appeals Ninth Circuit.

UNITED STATES of America, Appellant,
v.
AHTANUM IRRIGATION DISTRICT, a corporation, et al., Appellees.
330 F.2d 897
No. 17997.
March 18, 1964.

(Section of Decision Containing Decree)

*915 It is ordered, adjudged and decreed that the waters of Ahtanum Creek shall be and are hereby divided **between the parties to this action** in the following manner and at the following times, towit:

I

From the beginning of each irrigation season, in the spring of each year, to and including the tenth day of July of each such year, said waters shall be divided as follows:

a. **To defendants**, for use of their lands **north of Ahtanum Creek**, seventy-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations, provided that the total diversion for this purpose shall not exceed 46.96 cubic feet per second, and provided that when the said measured flow exceeds 62.59 cubic feet per second defendants shall have **no right to the excess**, **except in subordination** to the higher rights of the plaintiff.

b. To plaintiff, for use of Indian Reservation lands south of Ahtanum Creek, twenty-five per cent of the natural flow of Ahtanum Creek, as measured at the north and south gauging stations; provided that when that natural flow as so measured exceeds 62.59 cubic feet per second, **all the excess over that figure is awarded to plaintiff, to the extent that the said water can be put to a beneficial use.**

c. Plaintiff may divert such water from the south fork of Ahtanum Creek as can be beneficially used for the individual diversions into the Yakima Indian Reservation lying above the main Bureau of Indian Affairs diversion; provided, however, that the water diverted to such individual diversions shall be charged against and deducted from the overall award set forth in 'b' above.

d. To the plaintiff, for the lower Bureau of Indian Affairs diversion, a daily diversion of water representing five per cent of the natural flow of Ahtanum Creek as measured at the north and south fork gauging stations. This award shall represent plaintiff's interest in the return flow of the main stem of Ahtanum Creek, and the award to defendants shall be conditioned upon plaintiff receiving this flow of water at the lower Bureau of Indian Affairs diversion.

e. **To defendants, all the rest of the return flow in the main stem of Ahtanum Creek, and all the return flow in Hatton and Batchelor Creeks.**

f. Any water loss which may occur between the north and south fork gauging stations, and the defendants' Hatton Creek diversion, is to be absorbed by defendants; plaintiff being entitled to its full stated percentage of the measured flow, and defendants taking the balance

II

After the tenth day of July in each year, all the waters of **Ahtanum** Creek shall be available to, and subject to diversion by, the plaintiff for use on Indian Reservation lands south of **Ahtanum** Creek, **to the extent that the said water can be put to a beneficial use.**

The judgment is ordered modified further by adding thereto the following:

The court reserves jurisdiction to make such further orders as may be necessary to preserve and protect the rights herein declared and established, should a subsequent change in the situation or condition of the parties hereto so require.

Remanded with directions.

VIII. CERTIFICATE OF SERVICE

THE UNDERSIGNED STATES:

1. That I am over the age of 18 years, am a resident of the State of Washington, not a party hereto and am competent to testify herein.

2. On the below subscribed date, I sent, via e-mail, AND regular, first class mail, the subjoined BRIEF OF APPELLANT AHTANUM IRRIGATION DISTRICT to:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 15th day of March, 2010 at Yakima, Washington.

JAMES E. DAVIS